Supreme Court, U.S.
FILED
95 • 338 AUG 25 1995
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No. 1

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

CHARLES J. MANDACINA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTION PRESENTED

I. WHETHER THE DISTRICT COURT ERRED IN REFUSING PETITIONER'S PROFFERED MULTIPLE CONSPIRACY INSTRUCTION AND IN SUBMITTING THE CASE TO THE JURY UNDER AN INSTRUCTION THAT ALREADY FOUND A SINGLE, OVERALL CONSPIRACY, DESPITE THE FACT THAT EVIDENCE ADDUCED AT TRIAL ESTABLISHED THE EXISTENCE OF MULTIPLE, SEPARATE CONSPIRACIES RATHER THAN A SINGLE, OVERALL CONSPIRACY.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

CITATIONS OF OFFICIAL REPORTS
OF OPINIONS IN CASE vi

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

A. Procedural Statement of the Case 3

B. Factual Statement of the Case 3

REASON FOR GRANTING THE WRIT 10

I. WHETHER THE DISTRICT COURT ERRED IN REFUSING PETITIONER'S PROFFERED MULTIPLE CONSPIRACY INSTRUCTION AND IN SUBMITTING THE CASE TO THE JURY UNDER AN INSTRUCTION THAT ALREADY FOUND A SINGLE, OVERALL CONSPIRACY, DESPITE THE FACT THAT EVIDENCE ADDUCED AT TRIAL ESTABLISHED THE EXISTENCE OF MULTIPLE, SEPARATE CONSPIRACIES RATHER THAN A SINGLE, OVERALL CONSPIRACY 10

A. STANDARD OF REVIEW 10

B. THE GOVERNMENT'S EVIDENCE FAILED TO ESTABLISH THE EXISTENCE OF A SINGLE, UNIFIED CONSPIRACY; INSTEAD, THE EVIDENCE ESTABLISHED MULTIPLE CONSPIRACIES. 11

C. THE VARIANCE BETWEEN THE SINGLE CONSPIRACY IN THE INDICTMENT AND THE MULTIPLE CONSPIRACIES PROVEN AT TRIAL SUBSTANTIALLY PREJUDICED MANDACINA. 16

D. THE DISTRICT COURT'S REFUSAL TO GIVE A MULTIPLE CONSPIRACY INSTRUCTION IGNORED THE CLEAR MANDATE OF EIGHTH CIRCUIT LAW AND VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY PREVENTING HIM FROM PRESENTING HIS THEORY OF DEFENSE AND ELIMINATING AN ELEMENT OF THE OFFENSE FROM THE JURY'S DETERMINATION. 19

CONCLUSION 23

INDEX TO APPENDIX ..... App. i

TABLE OF AUTHORITIES

Cases **Page(s)**

Arcoren v. United States,
929 F.2d 1235 (8th Cir.),
cert. denied, 112 S.Ct. 312 (1991) 20

Bruton v. United States,
113 S.Ct. 418 (1992) 20

Chambers v. Mississippi,
410 U.S. 284 (1973) 20

County Court of Ulster County,
442 U.S. 140 (1972) 22

Dancy v. U.S.,
460 U.S. 1073 (1983) 10

In re Winship,
397 U.S. 358 (1970) 22

Kotteakos v. United States,
328 U.S. 750 (1946) 16, 17, 19, 21

Mathews v. United States,
486 U.S. 58 (1988), ... 20

Patterson v. New York,
432 U.S. 197 (1977) 22

Sullivan v. Louisiana,
508 U.S. ___ (1993) 22

United States v. Adipietro,
983 F.2d 1468 (8th Cir. 1993) ..... 11, 19, 20, App. v

United States v. Agofsky, 20 F.3d 866 (8th Cir.),
cert. denied, 115 S. Ct. 280, and *cert. denied*,
115 S. Ct. 363 (1994) ..... App. iv

United States v. Akers,
987 F.2d 507 (8th Cir. 1993) ..... App. xiii

United States v. Burchinal,
657 F.2d 985 (8th Cir.),
cert. denied, 454 U.S. 1086 (1981) ..... App. v

United States v. Bynum,
485 F.2d 490 (2d Cir. 1973) ..... App. xiv

United States v. Davis,
882 F.2d 1334 (8th Cir. 1989),
cert. denied, 494 U.S. 1027 (1990) ..... App. v, App vi

United States v. Gaudin,
___ U.S. ___, 1995 WL 360212
(June 19, 1995) 21, 22

United States v. Jackson,
696 F.2d 578 (8th Cir. 1982),
cert. denied sub. nom.,
Dancy v. U.S., 460 U.S. 1073 (1983) 10-12, 19

United States v. Jenkins,
7 F.3d 803 (8th Cir. 1993) ..... App. vii

United States v. Manafzadeh,
592 F.2d 81 (2d Cir. 1979) ..... App. vi

United States v. Mandacina,
46 F.3d 871 (8th Cir. 1995) ..... vi, 1

United States v. McCoy,
36 F.3d 740 (8th Cir. 1994) ..... App. ix

United States v. McGuire,
No. 94-1150, 1995 WL 10789
(8th Cir. Jan. 13, 1995) ..... App. vii

United States v. Miller,
974 F.2d 953 (8th Cir. 1992) ..... App. vii

United States v. Montanye,
962 F.2d 1332 (8th Cir. 1992),
reh'g. granted and opinion vacated,
962 F.2d at 1349, *cert. denied sub nom.,*
Bruton v. United States, 113 S.Ct. 418 (1992),
affirmed, 996 F.2d 190 (8th Cir. 1993) ..... 20, App. v

United States v. Peterson,
611 F.2d 1313 (10th Cir. 1979),
cert. denied, 447 U.S. 905 (1980) 17

United States v. Smith,
No. 93-3610, 1995 WL 7680
(8th Cir. Jan. 11, 1995) ..... App. vi

United States v. Snider,
720 F.2d 985 (8th Cir. 1983),
cert. denied, 465 U.S. 1107 (1984) 11, 16-19

United States v. Sykes,
977 F.2d 1242 (8th Cir. 1992) ..... App. vi

United States v. Townsend,
924 F.2d 1385 (7th Cir. 1991) 12, 15

United States v. Tramunti,
513 F.2d 1087 (2d Cir. 1985) ..... App. xiv

United States v. Trupiano,
11 F.3d 769 (8th Cir. 1993) ..... App. vii

United States v. Watts,
950 F.2d 508 (8th Cir. 1991),
cert. denied, 112 S.Ct. 1276 (1992) 11

United States v. Zemek,
634 F.2d 1159 (9th Cir. 1980),
cert. denied, 452 U.S. 905 (1981) 12

Constitutional, Statutory, and Regulatory Authorities

U.S. Const. amend. V 10, 21

U.S. Const. amend. VI 10, 21

18 U.S.C. § 2 3

18 U.S.C. § 924(c) 3

18 U.S.C. § 1001 21

28 U.S.C. § 1254(1) 1

CITATIONS OF OFFICIAL REPORTS OF OPINIONS IN CASE

The primary opinion of the United States Court of Appeals for the Eighth Circuit whose review is sought by Petitioner was decided and filed on February 6, 1995. The opinion is reported as *United States v. Mandacina*, 46 F.3d 871 (8th Cir. 1995), and is set forth in the Appendix at pages App.ii-ix.

STATEMENT OF JURISDICTION

The appeal of *United States v. Mandacina*, whose review Petitioner seeks, was decided by a panel of the United States Court of Appeals for the Eighth Circuit on February 6, 1995. *United States v. Mandacina*, Case No. 94-2383WM (8th Cir. February 6, 1995). (App. at ii-ix).[1]

Petitioner filed a motion for extension of time in which to file this Writ which was granted on May 31, 1995. (App. vii). Petitioner timely files this Petition for Writ of Certiorari on or before August 25, 1995.

The United States Supreme Court has jurisdiction to review this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) (1988).

[1] All references to the Appendix contained within this Petition shall be to "App. ___".

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

United States Constitution, Amendment VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE[2]

A. Procedural Statement of the Case

Petitioner's conviction was the result of a jury trial on eight counts of an Indictment alleging a conspiracy to rob banks, violate firearms laws and launder money. Mandacina was convicted of the conspiracy charged in Count I; on Counts II and IV of aiding and abetting sales of firearms to a convicted felon in 1988 and January 1990; on Counts VI and XI of aiding and abetting armed bank robberies in January 1990 and September 1990; on Count IX of supplying a firearm to a convicted felon in September 1990; and on Counts VII and XII under 18 U.S.C. §§ 924(c) and 2 of aiding and abetting the use of firearms during the robberies charged in Counts VI and XI.

Mandacina was sentenced on March 23, 1994 to the custody of the Bureau of Prisons for a period of three hundred seventy months, which sentence included mandatory consecutive sentences of five years and twenty years pursuant to the provisions of 18 U.S.C. § 924(c) for conviction under Counts VII and XII, in addition to the sixty and seventy month concurrent sentences imposed as a result of the convictions under Counts I, II, IV, VI, IX and XI.

B. Factual Statement of the Case

The evidence under which Mandacina was convicted of all charges at issue in this petition, came primarily from the testimony of Tom Earlywine and Terry Dodds, two of the three

[2] Petitioner Charles J. Mandacina shall be referred to throughout this Petition as "Petitioner" or "Mandacina."

persons who had committed the bank robberies (these three, Earlywine, Dodds, and McGuire shall be referred to as "the bank robbers") and from an informant, Brock DiCastrogiovannimousolf (hereinafter "Brock").

In approximately 1986, Earlywine and McGuire began robbing grocery stores across the Midwest. They continued to do so for several years. In the spring of 1987, Earlywine and McGuire traveled to Kansas City and bought two handguns and a shotgun from Petitioner, who was generally referred to in the trial testimony as "Buddy Mandacina." There was no evidence that the guns McGuire and Earlywine purchased from Mandacina in 1987 were used to commit any bank robbery alleged in the Indictment. No evidence was presented that at the time of the 1987 weapon sale, there was a plan between Earlywine and McGuire to rob banks and launder the proceeds. Earlywine testified that he and McGuire did not decide to start robbing banks until April 1989.

In the fall of 1988, Earlywine and McGuire returned to Kansas City and bought several pistols and an AR-15 assault rifle from Salvatore Mandacina. According to Earlywine, the sale of these firearms was arranged by Petitioner. After purchasing weapons in Kansas City in the fall of 1988, Earlywine and McGuire continued to rob grocery stores for approximately the next eight months. No evidence was presented that, at the time of the 1988 gun sale, there was any plan between Earlywine and McGuire to rob banks and launder the money, or to link the 1988 gun sale to the 1987 gun sale.

In April 1989, Earlywine and McGuire decided to switch from robbing grocery stores to robbing banks. They robbed their first bank together in May of 1989. From May 1989 through August 1989, Earlywine and McGuire robbed three banks. There was no evidence that any gun bought from or through Petitioner in 1987, or in the fall of 1988, was used

in any of these robberies. In each of these robberies, as in the robberies in Wichita, Kansas in November 1989, in Omaha, Nebraska, and Columbus, Ohio in 1990, Earlywine used a gun described in the evidence as either a chrome-plated or silver .357 magnum.

In November 1989, Earlywine, McGuire, and Dodds robbed a Savings & Loan in Wichita. Earlywine testified that the guns used to rob the Wichita Savings & Loan were purchased through Mandacina about a year earlier in the fall of 1988. There was no evidence that when the robbers purchased guns in the fall of 1988, they did so with intent of robbing a bank in Wichita. Earlywine stated that he carried his .357 revolver, that McGuire had an assault rifle, and that there were other pistols in their getaway vehicle. Earlywine's testimony regarding the source of the weapons used for the Wichita robbery conflicted with his testimony that the .357 he used in Wichita was a weapon he had purchased in Rockford, Illinois, in approximately 1987, and that he had used it in the three bank robberies in 1989, prior to the Wichita robbery. Earlywine's testimony that McGuire used the assault rifle bought in 1988 in Kansas City also conflicted with his statement to FBI Special Agent Kraft shortly after his arrest. He told Agent Kraft that McGuire had used a MAC-10 (not the assault rifle purchased from Petitioner) during the commission of the robbery in Wichita. There was no evidence to indicate that Earlywine and McGuire had purchased a MAC-10 from Mandacina at any point in time. Earlywine testified that McGuire purchased a MAC-10 from Tony Best in Rockford, Illinois, in 1987. Dodds testified that the weapons used in the Wichita robbery included the .357 magnum and a .38 caliber revolver. Neither weapon was a type described as one that had been purchased from Petitioner in the fall of 1988.

Earlywine and Dodds testified that each of the bank robberies they committed with McGuire were planned sepa-

rately and were independent of all other bank robberies. Each robbery commenced with McGuire suggesting it was time to go on the road and ended with the commission of the robbery planned exclusively by McGuire. Earlywine testified each robbery was a "singular" event. Dodds testified that each of the bank robberies was a separate and distinct offense that ended with the commission of the robbery. Dodds expected each robbery would be the last one. Each time the bank robbers committed a robbery there was no plan to commit any additional robberies at a later time. Dodds stated there were a number of separate and distinct conspiracies that took place in different cities throughout the Midwest over a period of time.

In January 1990, McGuire organized another road trip. McGuire, Earlywine, and Dodds traveled to Kansas City in early January 1990 to acquire more guns. Earlywine and Dodds testified that prior to coming to Kansas City in January 1990, the bank robbers (Earlywine, McGuire and Dodds) already possessed the .357 purchased by Earlywine in 1986 or 1987 in Rockford, Illinois, that he had used in multiple bank robberies; an AR-15 assault rifle; a .38 caliber pistol; one or more sawed-off shotguns; and, perhaps, the MAC-10. Earlywine told Special Agent Kraft that McGuire had thrown the MAC-10 away in 1988.

After the bank robbers had been in Kansas City for several days, John Mandacina, cousin of the Petitioner, arranged for McGuire and Earlywine to purchase weapons at the Shur-Shot Gun Shop (owned by co-Defendant Dennis Crouch). There was no evidence that Petitioner aided or was involved in arranging the sale by Crouch to McGuire at the Shur-Shot on the afternoon of January 12. Also on January 12, or early on the morning of January 13, the guns were delivered to the Red Front Restaurant (owned partly by Petitioner

and his cousin, John). Earlywine testified that although he does not know how the guns got to the Red Front, he saw Mandacina hand a large bag containing weapons out the back door to McGuire and Dodds. According to Earlywine, the weapons purchased in January 1990 included a .380 semi-automatic pistol, a .22 rifle, a .45 pistol, a .44 pistol, a 9 mm. semi-automatic pistol and a MAC-10. Earlywine testified that when the bank robbers came to Kansas City in January 1990, they already had the .357 magnum, the AR-15 assault rifle and a shotgun with them.

After leaving Kansas City on January 13, the bank robbers drove to Omaha, where, on or about January 17, they robbed the Occidental Savings & Loan. Earlywine testified that the weapons carried in the Omaha robbery included his .357 and a .38 pistol that had been purchased prior to the gun transaction in Kansas City in January 1990.

Dodds testified that Mandacina carried a bag of weapons in through the front door, right past where Dodds and Earlywine were sitting. Earlywine saw no such thing. Brock saw Crouch carry the bag of guns directly from his van to the back of the Red Front. Dodds said that Salvatore Mandacina, not Petitioner, placed the guns in the van. Dodds' description of the guns also differed from Earlywine's. Dodds testified that the weapons purchased in January 1990 in Kansas City included a .44 pistol, a number of percussion grenades, a .38 pistol and a .45 pistol. Dodds agreed with Earlywine that the two weapons used in the robbery in Omaha were Earlywine's .357 and a .38 pistol. Dodds stated that McGuire had the assault rifle (not a MAC-10) in the van. Dodds also stated that the .38 and .357 carried in the Omaha robbery were owned by the bank robbers prior to coming to Kansas City in 1990.

Brock testified that, although she accompanied Crouch to the Red Front early in the morning on January 13th and observed Crouch carry a large bag containing weapons from his van to the back of the Red Front and come back with a substantial sum of money, she testified that later the same morning, Crouch sold a second bag of weapons to McGuire from Crouch's van which was then located behind the Shur-Shot Gun Shop. Brock did not know what weapons were included in either of the two weapons sales she observed. She reported her observations of these two gun sales to FBI Special Agent Fencl within days. Mandacina was not linked in any way to the second gun sale.

After the robbery in Omaha, the next robbery involving any of the trio of bank robbers took place in Columbus, Ohio in April 1990, when Earlywine and McGuire committed a robbery using Earlywine's .357 and a MAC-10.

In approximately August 1990, Earlywine and McGuire lost several of their weapons in a bar in Nashville, Tennessee. Fearing they would be apprehended, they then discarded their remaining guns. One of the guns found by police in Nashville was the chrome-plated .357. Dave Dylak testified he sold such a gun to Earlywine in Rockford in 1988.

McGuire and Earlywine then came to Kansas City in early September 1990, and, according to Earlywine, borrowed two pistols and a shotgun from Mandacina. Earlywine stated that one of these pistols, a .38, and a shotgun were used to commit the robbery of the Local Federal Savings & Loan in Oklahoma shortly thereafter. Earlywine testified that after the robbery in Oklahoma, he and McGuire returned to Kansas City and gave the .38 pistol back to Mandacina. Dodds, however, testified that at the time he and McGuire committed a robbery in Wisconsin in December 1990, McGuire used a .38 pistol.

McGuire and Dodds were apprehended in a robbery in Milwaukee, and Dodds' confession led to the arrest of Earlywine some months later. No robberies were committed by Dodds, Earlywine or McGuire after the Milwaukee robbery in December, 1990.

During the trial at the jury instruction conference, the district court refused to submit Petitioner's tendered jury instructions regarding multiple conspiracies. (App. xiv). The verdict directing instructions read and given to the jury, with respect to the other substantive counts, entitled the jury to find Petitioner guilty of said counts if the jury found Petitioner guilty of the conspiracy count. (App. xv-xxv).

REASON FOR GRANTING THE WRIT

I. WHETHER THE DISTRICT COURT ERRED IN REFUSING PETITIONER'S PROFFERED MULTIPLE CONSPIRACY INSTRUCTION AND IN SUBMITTING THE CASE TO THE JURY UNDER AN INSTRUCTION THAT ALREADY FOUND A SINGLE, OVERALL CONSPIRACY, DESPITE THE FACT THAT EVIDENCE ADDUCED AT TRIAL ESTABLISHED THE EXISTENCE OF MULTIPLE, SEPARATE CONSPIRACIES RATHER THAN A SINGLE, OVERALL CONSPIRACY.

The indictment charged a single, overall conspiracy existing between January 1987 and March 1992, to rob banks. The evidence at trial established multiple, independent conspiracies involving multiple participants and multiple, independent transactions with varying degrees of participation by the individuals involved. The variance between the indictment and the evidence at trial grossly prejudiced Petitioner. The district court refused to give Petitioner's proffered multiple conspiracy instructions (App. xiv, xxvii-xxx), and instead submitted the case to the jury on a theory of a single, unified conspiracy. The district court's error grossly prejudiced Mandacina and violated his constitutional rights as guaranteed by the Fifth and Sixth Amendments to the United States Constitution. This error so tainted the entirety of the trial that reversal on all counts is warranted.

A. STANDARD OF REVIEW

The evidence is reviewed in the light most favorable to the verdict. *United States v. Jackson*, 696 F.2d 578, 582 (8th Cir. 1982), *cert. denied sub. nom., Dancy v. U.S.*, 460 U.S. 1073 (1983). In the case of conspiracy, whether one conspiracy or

multiple conspiracies exist is a question for the jury. *United States v. Adipietro*, 983 F.2d 1468, 1475 (8th Cir. 1993) (citing *United States v. Watts*, 950 F.2d 508, 512 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1276 (1992)). When the indictment charges one conspiracy but the evidence establishes multiple conspiracies, the error of variance has occurred. *United States v. Snider*, 720 F.2d 985, 989 (8th Cir. 1983), *cert. denied*, 465 U.S. 1107 (1984). The reviewing court then must determine whether the variance substantially prejudiced the defendant. *Id.* Mandacina's request for instructions on multiple conspiracies was rejected. In similar circumstances, the Eighth Circuit has stated that, "when such instructions have not been given, this Court of Appeal should give heightened scrutiny to the Defendant's claim that the jury erroneously 'transferred guilt from one to another and [found] Defendants guilty of an overall conspiracy.'" *United States v. Jackson*, 696 F.2d 578, 586 (8th Cir. 1982). The Eighth Circuit failed to follow its own precedent in this case.

Viewing the evidence in the light most favorable to the verdict, Petitioner submits that this Court will find evidence of multiple conspiracies and that the variance between indictment and proof substantially prejudiced Mandacina. Because the district court refused Defendant's request for multiple conspiracy instructions (App. xiv, xxvii-xxx), heightened scrutiny should be given to Petitioner's claim of prejudice.

B. THE GOVERNMENT'S EVIDENCE FAILED TO ESTABLISH THE EXISTENCE OF A SINGLE, UNIFIED CONSPIRACY; INSTEAD, THE EVIDENCE ESTABLISHED MULTIPLE CONSPIRACIES.

Although the Government alleged in its indictment that Mandacina was part of a single unified conspiracy to rob

banks extending from 1987 to March 1992, the evidence at trial quite clearly demonstrated that no such conspiracy existed. In order for a conspiracy to exist, there must be "one overall agreement to perform various functions to achieve the objectives of the conspiracy." *Jackson*, 696 F.2d at 582 (quoting *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981)). Proving the existence of a conspiracy is no easy task; the Government generally must rely upon circumstantial evidence from which a common aim or purpose can be inferred. *Id. See also United States v. Townsend*, 924 F.2d 1385, 1390 (7th Cir. 1991). In the instant case, however, the Government's own evidence directly refuted the allegation in the indictment that there was a single, unified conspiracy to rob banks in the Midwest. The Government's chief witnesses both admitted that there never was one overall conspiracy, saying instead that each robbery was its own separately conceived and hatched venture.

Earlywine testified that each robbery stood alone:

Q. Did you have a plan - before the first bank robbery, did you have a long, drawn out plan that you were going to rob all of these different banks in all of these different cities or was this a one at a time type of thing?

A. It was a singular thing.

Q. A singular thing, in your words, correct?

A. That's what I said.

Q. You didn't even start talking about another city or another bank robbery until you ran out of money; is that correct?

A. No. It's not until we ran out of money.

(App. xxxi).

The testimony of Dodds even more explicitly established the existence of multiple conspiracies rather than the single conspiracy charged in the indictment.

Q. Let's talk about the conspiracies and how they worked. Would it be fair to say there was no long drawn out plan, well thought out plan in Rockford, Illinois, that alright fellows, on this day we are going to hit Wichita, on this day we are going to hit Waukesha, on this day we are going to hit Milwaukee, on this date we are going to hit Omaha. That's not how that worked, correct?

A. That's correct, sir.

Q. You guys would go wherever you planned these robberies and drink, and say, well, let's plan Omaha tomorrow. You would do whatever you had to do to get to Omaha, when you got home, split the loot up. Then that was the end of it, correct?

A. Yes. For the most part; that's correct.

Q. That was the end of that conspiracy, correct? Then when you ran out of money, you would come up with another conspiracy to rob another bank?

A. Yes, sir.

Q. That's how it worked?

A. That's the way Mr. McGuire ran things. Yes, sir.

Q. We are talking about separate and distinct conspiracies, when he robbed Omaha, Wichita, Waukesha, etc., correct?

A. We did what I was told by Mr. McGuire. Yes, that's correct, if that's the way you want to put it.

Q. When you get home and split up the loot, the conspiracy to rob that particular bank is over with, correct?

A. Yes, correct.

Q. Thank you. And as you would rob one bank, there was no plan to commit a particular robbery in another city at another time?

A. Not a particular plan, no, sir.

Q. And was it contemplated as you rob each bank, that this would be your last bank, hopefully you would go home and get legitimate jobs, and not have to go resort to robbing banks again?

A. I know I felt that way. I don't know if Mr. McGuire did though.

Q. How about Earlywine?

A. I can't speak for him, sir. I don't know.

Q. So basically we have a number of separate and distinct conspiracies taking place in different cities throughout the midwest and the United States. Correct?

A. Yes, sir.

(App. xxvi-xxviii).

The testimony of Earlywine and Dodds establishes that each individual bank robbery was its own excursion, separately planned and executed, and definitely not part of a single overall conspiracy to rob banks in the Midwest. It may well be that Pat McGuire harbored a scheme for multiple robberies in his own mind, unknown to anyone else, but this would not be sufficient to prove a single conspiracy, for the essence of conspiracy is the meeting of the minds, an agreement. *Townsend*, 924 F.2d at 1390. In the instant case, there was no unifying agreement.

The Government alleged a grand scheme to rob banks throughout the Midwest, with the Red Front Restaurant operating as a sort of safe haven and supply center. The Government's evidence, however, totally failed to link the 1987 gun sale to the 1988 or 1990 gun sales and also failed to link either the 1987 or 1988 gun sales to plans to commit any bank robbery. Earlywine testified that the 1987 and 1988 sales were unrelated, separate adventures that occurred prior to the time he and McGuire had even thought of and/or planned a bank robbery. If the robbers had no plans to rob banks prior to April 1989, could Mandacina's sale of guns in 1987 and 1988 have been part of an agreement to do something that wasn't even contemplated by his alleged co-conspirators? The law of conspiracy is not built on such thin reeds of logic.

Further diminishing the Government's single conspiracy theory was the failure to present any evidence that the loot from the unrelated bank robberies was laundered by or though Mandacina. Except in reference to the Columbus, Ohio robbery, when Earlywine said McGuire laundered the proceeds through Mandacina, the government failed to present proof of a conspiracy (as alleged) to launder money.

Accordingly, the jury disbelieved any money laundering evidence and acquitted Mandacina of Count VIII. What the Government actually proved was a number of separate conspiracies involving three guys who decided to rob a grocery store, a bank, or a shoe store whenever they ran out of money.

The Government's own witnesses suffered no delusions of grandeur as to the nature and extent of their criminal activities. As far as the actual participants were concerned, each robbery stood alone.

C. THE VARIANCE BETWEEN THE SINGLE CONSPIRACY IN THE INDICTMENT AND THE MULTIPLE CONSPIRACIES PROVEN AT TRIAL SUBSTANTIALLY PREJUDICED MANDACINA.

Variance occurs when a single conspiracy is alleged, but multiple conspiracies are proven. *United States v. Snider*, 720 F.2d 985, 989 (8th Cir. 1983). Once a reviewing court determines that variance has occurred, it then must ask whether the variance so prejudiced the defendant that reversal of the conspiracy conviction is required. *Id.* The reviewing court is required to reverse if it cannot say, "after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

The prejudice to Mandacina comes from a false inference of guilt by association with people who robbed banks, grocery stores and shoe stores. This erroneous transference of guilt is particularly likely to occur in hub-type conspiracies, where a number of different conspiracies (like spokes of a wheel) are *allegedly* connected to a central hub. In this case, each bank robbery conspiracy (with its various participants)

was a separate spoke, the hub of them all being Pat McGuire, not Petitioner. This Court has recognized the particular danger of the jury transferring guilt.

> The dangers for transference of guilt from one to another across the line separating conspiracies, sub-consciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place.

Kotteakos v. United States, 328 U.S. at 774.

In the instant case, as in *Kotteakos*, the problem with the Government's proof is that there was no rim to enclose the individual spokes, thereby, linking Mandacina to the multiple crimes. In fact, just the opposite was true. While there was some evidence to link Mandacina to the plan to rob the bank in Omaha in January 1990 and to link Mandacina to the separate plan to rob the bank in Oklahoma in September 1990, there was no evidence to establish the "rim" to connect the Omaha and the Oklahoma robberies or to connect either robbery to the 1987 and 1988 gun sales. Earlywine and Dodds testified as to the number of individual plans to buy guns and rob a bank, but never admitted one single, unifying conspiracy to rob multiple banks. In other words, there was no rim.

The danger of false inference of guilt was enhanced in this case because, not only were there multiple defendants, but there were also multiple independent transactions with various degrees of participation by the multiple defendants in each transaction. *Cf. United States v. Peterson*, 611 F.2d 1313, 1325 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

United States v. Snider, 720 F.2d 985 (8th Cir. 1983), is closely analogous to the instant case. In *Snider*, the Govern-

ment tried to link marijuana-growing activities on two separate farms into a single overall conspiracy. *Id.* at 987. The Eighth Circuit reversed the conspiracy convictions of three appellants because of prejudicial variance between the indictment and the proof at trial. *Id.* The Court held, "the Government proved two similarly motivated but distinct conspiracies. ... No evidence links these two conspiracies. The participation of Carr, Forsythe and Yost in both conspiracies does not prove one mutual agreement binding Austin and the appellants. Common actors are not a sufficient nexus to prove one overall conspiracy." *Id.* at 988. There was neither a multiple conspiracy instruction nor a limiting instruction that evidence relating to other conspiracies could not be held against appellants. *Id.* at 990. This prejudiced the jury because there was nothing to prevent them from transferring evidence of Austin's guilt (Austin was a hardened criminal who had robbed banks in order to finance the purchase of the farm involved in the first conspiracy) to the appellants: The jury had been instructed only to consider whether the appellants were members of "*the conspiracy*". *Id.* The plight of Petitioner is not materially different from that of the *Snider* appellants. The jury heard evidence of a number of different gun purchases and robberies. Although the Government's chief witnesses testified that there was no overall conspiracy, the jury was instructed regarding only one conspiracy.

The entire case was tainted because the instructions under which Petitioner was convicted for the counts relating to aiding and abetting gun sales, bank robberies, and the use of firearms in the commission of crimes permitted the jury to find Mandacina guilty on said counts if the jury found him guilty of the conspiracy charged in Count I of the indictment. (*See* instructions 23, 28, 39 and 40, App. xv-xxv). Had the jury been instructed properly on the issue of multiple conspiracies, Mandacina would not have suffered the substantial preju-

dice he incurred because, under the evidence in this case, he would not have been convicted of a single conspiracy from 1987 through March 1992 as charged.

D. THE DISTRICT COURT'S REFUSAL TO GIVE A MULTIPLE CONSPIRACY INSTRUCTION IGNORED THE CLEAR MANDATE OF EIGHTH CIRCUIT LAW AND VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY PREVENTING HIM FROM PRESENTING HIS THEORY OF DEFENSE AND ELIMINATING AN ELEMENT OF THE OFFENSE FROM THE JURY'S DETERMINATION.

When there is evidence of multiple conspiracies, the defendant is entitled to jury instructions on multiple conspiracies. *United States v. Snider*, 722 F.2d 985, 990 (1983) (quoting *United States v. Jackson*, 696 F.2d at 585-586). Because "the issue of whether a single conspiracy or multiple conspiracies existed is a question for the jury," *United States v. Adipietro*, 983 F.2d 1468, 1475 (8th Cir. 1993), it is essential that the jury receive adequate instruction on the matter.

Instructing on a single conspiracy when proof at trial suggests multiple conspiracies has the "unfortunate effect of charging the jury that a single conspiracy must be found," and "prevents a court from giving a precautionary instruction such as would be appropriate, perhaps required, in cases where related but separate conspiracies are tried together ..., namely, that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy charged.'" *Jackson*, 696 F.2d at 584 (quoting *Kotteakos*, 328 U.S. at 769-770). Petitioner was denied the benefit of his proposed multiple conspiracy instructions (App. xiv, xxviii-xxx), which would, at least, have provided some

protection from the taint of transference of guilt from one conspiracy to another.

More than that, the district court's refusal to give multiple conspiracy instructions violated constitutional rights by denying Mandacina the right to present his theory of defense and eliminating a jury determination as to an essential element of the offense.

"A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Arcoren v. United States*, 929 F.2d 1235, 1245 (8th Cir.), *cert. denied*, 112 S.Ct. 312 (1991) (quoting *Mathews v. United States*, 486 U.S. 58, 63 (1988)). The Eighth Circuit has said that, although a district court has wide discretion in formulating its charge to the jury, "defendants shall receive a theory of defense if a timely request is made, the evidence supports the proffered instruction, and the instruction correctly states the law." *United States v. Montanye*, 962 F.2d 1332 (8th Cir. 1992), *reh'g. granted and opinion vacated*, 962 F.2d at 1349, *cert. denied sub. nom., Bruton v. United States*, 113 S.Ct. 418 (1992), *affirmed* 996 F.2d 190 (8th Cir. 1993). It violates due process for a court to deny a defendant the opportunity to present his theory of defense. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973)(holding that it was a violation of due process not to allow a criminal defendant to present exculpatory evidence).

In the instant case, the testimony of both Dodds and Earlywine provided "evidence sufficient for a reasonable jury to find in his [Defendant's] favor," (*Arcoren*, 929 F.2d at 1245), on the theory that multiple conspiracies were involved. Even though Eighth Circuit law makes clear that the issue of single or multiple conspiracies is for the jury to decide, (*Adipietro*, 983 F.2d at 1475), the district court refused Mandacina's proffered multiple conspiracy instruction. Due process was de-

nied because Petitioner was forced to stand trial on the charge of a single, unified conspiracy, but, yet, not allowed to submit his theory of defense and have the jury determine whether there were multiple conspiracies. As this Court observed in *Kotteakos*, "the instructions often become, in such cases, [a defendant's] principal protection against unwarranted imputation of guilt from others' conduct." 328 U.S. at 776, 777.

Without the multiple conspiracy instructions Mandacina had no protection against unwarranted imputation of guilt from the robbers' conduct of multiple, independent robberies. In fact, the jury did not even have to find Petitioner guilty of any substantive offenses, because the jury instructions permitted them to find him guilty of the other counts alleged against him if they found him guilty of the one overall conspiracy charged in Count I, a conspiracy that never existed. (App. xv-xxv).

Recently, this Court held that when the accused is charged with violating 18 U.S.C. § 1001 the question of materiality, an essential element of the offense, is one for the jury. *United States v. Gaudin*, ___ U.S. ___, 1995 WL 360212 (June 19, 1995). The Fifth and Sixth Amendments to the United States Constitution require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. *Id.* at 3-5. Such rationale applies in this case to reverse Petitioner's convictions. Charged with a conspiracy involving the robbery of a number of banks, it was the responsibility of the jury to determine that Petitioner was involved in such a conspiracy. Because the participants in said bank robberies (Earlywine and Dodds) testified that there existed a number of separate and independent conspiracies to rob one bank at a time after the acquisition of weapons for said robbery, it was up to the jury to find one overall conspiracy based on the evidence adduced at trial.

As in *Gaudin*, by refusing to instruct the jury on the issue of multiple conspiracies as requested by Petitioner, the district court found, as a matter of law, that there was only one conspiracy. Such a finding eliminated the jury's role with respect to one of the essential elements of Count I. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 6 (referencing *Sullivan v. Louisiana*, 508 U.S. ___ (1993); *County Court of Ulster County*, 442 U.S. 140, 156 (1972); *Patterson v. New York*, 432 U.S. 197, 205 (1977); *In re Winship*, 397 U.S. 358, 364 (1970)). By refusing to instruct on multiple conspiracies, the district court prevented the jury from drawing the ultimate conclusion of guilt or innocence of Petitioner upon applying all the law to the facts as to an essential element of the offense. Accordingly, this Court's holding in *Gaudin*, requires reversal of Petitioner's conviction on Count I (conspiracy), and also on each and every other count of conviction because the jury instructions entitled the jury to find Petitioner guilty on each substantive count if they found Petitioner guilty of Count I.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari as to the decision of the Eighth Circuit Court of Appeals, Case No. 94-2383WM, reverse and remand his case for new trial.

Respectfully submitted,

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INDEX TO APPENDIX

Page(s)

Opinion, United States Court of Appeals for the Eighth Circuit ..... i-ix

Letter granting extension to file petition for writ of certiorari ..... x-xi

Judgment of United States Court of Appeals for the Eighth Circuit xii

Order Denying Petition for Rehearing xiii

Proffered Multiple Conspiracy Jury Instructions xiv

Jury Instruction No. 23, 28, 39, 40 ..... xv-xxv

Trial Transcript, pp. 1268-1269 ..... xxvi-xxviii

Jury Instruction Conference, pp. 1794-1798 (excerpts) ..... xxviii-xxx

Trial Transcript, p. 657 xxxi

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1939WM

United States of America,

Appellee,

v.

Dennis M. Crouch,

Appellant.

Appeals from the United States District Court for the Western District of Missouri.

No. 94-2383WM

United States of America,

Appellee,

v.

Charles J. Mandacina, also known as Buddy Mandacina,

Appellant.

Submitted: November 14, 1994

Filed: February 6, 1995

Before FAGG, WOLLMAN, and HANSEN, Circuit Judges.

FAGG, Circuit Judge.

This case arises from gun sales by Dennis M. Crouch and Charles J. Mandacina to a group of three men who robbed banks together: Thomas Earlywine, Terrence Dodds, and Patrick McGuire, a formerly convicted felon. Based on the sales, a jury convicted Crouch and Mandacina of conspiracy to commit armed robbery. The jury found Crouch not guilty of other charges, but found Mandacina guilty of aiding and abetting firearm sales to a convicted felon, aiding and abetting two armed bank robberies in Oklahoma and Nebraska, aiding and abetting the use of firearms during the Oklahoma and Nebraska robberies, and supplying a firearm to a convicted felon. Crouch and Mandacina appeal their convictions, and Mandacina also appeals his sentence. We affirm.

Viewing the evidence and the reasonable inferences from the evidence in the light most favorable to the verdict, a jury could reasonably find the following facts. Mandacina, the owner of a restaurant in Kansas City, began selling guns to McGuire and Earlywine in 1987. Mandacina knew McGuire and Earlywine were using the guns to commit robberies.

Dodds, McGuire's brother-in-law, joined the two robbers in July 1989. McGuire developed a master plan for robbing banks and the three men began to commit bank robberies across the country using guns supplied by Mandacina. The robbers returned to Kansas City whenever they needed more guns. In January 1990 a woman named Brock DeCastrogiovannimausolf (Brock) introduced McGuire to her boyfriend Crouch, who owned a gun shop in Kansas City. Crouch initially refused to sell guns to McGuire. After Mandacina's cousin intervened on McGuire's behalf, however, Crouch sold McGuire some guns. Following the sale, Crouch warned Brock not to associate with McGuire because he was a bank robber and a murderer. A few days later, the robbers robbed a bank in Omaha, Nebraska using a gun they obtained from Crouch. In August 1990 Mandacina loaned the robbers a gun and money to finance a trip for another bank robbery. After robbing a bank in Warr Acres, Oklahoma with Mandacina's gun, the robbers returned to Kansas City, gave back the gun, repaid the loan, and paid Mandacina several thousand dollars as his share of the robbery proceeds. The robberies continued until December 1990 when McGuire and Dodds were arrested during a bank robbery.

Crouch first asserts the evidence was insufficient to support his conspiracy conviction. To convict a defendant of conspiracy, the Government must show there was an agreement to achieve an illegal purpose, the defendant knew of the agreement, and the defendant intentionally joined the conspiracy. *United States v. Agofsky*, 20 F.3d 866, 870 (8th Cir.), *cert. denied*, 115 S. Ct. 280, and *cert. denied*, 115 S. Ct. 363 (1994). Crouch asserts he lacked the necessary knowledge of the agreement and intent to join the agreement. According to Crouch, evidence of his single sale of guns to McGuire in January 1990 is not enough to show he intentionally joined an agreement to supply guns for robberies carried out between

January 1987 and March 1992, the conspiracy's time frame as charged in the indictment. We reject Crouch's assertions.

A person intentionally joins a conspiracy when the person knowingly contributes efforts in furtherance of the conspiracy's objectives. *United States v. Burchinal*, 657 F.2d 985, 990 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). A person may join a conspiracy after its inception when, with knowledge of the conspiracy's existence, the person sells conspirators supplies necessary for the conspiracy's operation. *See id.* n.2; *see also United States v. Montanye*, 962 F.2d 1332, 1341 (8th Cir. 1992) (delivery of glassware necessary for methamphetamine laboratory sufficient to support conviction for conspiracy to manufacture methamphetamine), *on reh'g in part*, 996 F.2d 190 (1993) (en banc). Based on Crouch's warnings to Brock about McGuire and Crouch's discussions with Mandacina's cousin before the January 1990 gun sale, the jury could reasonably infer Crouch knew of the conspiracy to commit robberies and intentionally joined the conspiracy by selling McGuire guns.

Crouch and Mandacina assert the evidence showed multiple conspiracies to commit armed robberies rather than the single conspiracy charged because the robbers testified each robbery was separately planned. Crouch and Mandacina assert this variance between the evidence and the indictment prejudiced them. In reviewing these assertions, we must decide whether the totality of the evidence showed one overall agreement to achieve a common objective with individuals performing different functions, or more than one agreement, each with a separate objective. *United States v. Davis*, 882 F.2d 1334, 1342 (8th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990). Viewing the evidence in the light most favorable to the verdict, *United States v. Adipietro*, 983 F.2d 1468, 1475 (8th Cir. 1993), a reasonable jury could find one overall agreement to

commit armed robberies with the conspirators performing different functions. McGuire, Earlywine, and Dodds participated in the robberies, and Mandacina and Crouch provided the necessary guns. Because the evidence showed a single conspiracy, we reject Crouch's related contention that the district court should have instructed the jury on multiple conspiracies. *Davis*, 882 F.2d at 1341-42.

Crouch next contends the district court abused its. discretion in denying cross-examination of Earlywine about murder charges that would have been filed against him if he had not cooperated with the Government. Because Earlywine was cross-examined extensively about other possible penalties for his failure to cooperate, the district court did not abuse its discretion in refusing more cross- examination along the same lines. *See United States v. Smith*, No. 93-3610, 1995 WL 7680, at *2 (8th Cir. Jan. 11, 1995). The jury could appropriately draw inferences about Earlywine's reliability from the permitted cross-examination. *See id.*

Crouch also contends the district court erroneously admitted evidence of his earlier illegal gun sales to indicted persons during the Government's case-in-chief. The district court admitted the evidence under Federal Rule of Evidence 404(b) to show Crouch's motive, opportunity, intent, knowledge, and preparation or plan to commit the crimes charged. The district court has broad discretion to admit evidence of other crimes under Rule 404(b) unless the evidence tends to prove only the defendant's criminal disposition. *United States v. Sykes*, 977 F.2d 1242, 1246 (8th Cir. 1992). Evidence of other crimes is admissible if it is, among other things, relevant to a material issue and more probative than prejudicial. *Id.* Crouch contends the evidence was not relevant to show his intent because he denied making the January 1990 gun sale to McGuire. *See United States v. Manafzadeh*, 592 F.2d 81, 86-87 (2d Cir. 1979). We have consistently held Rule 404(b) evidence

is admissible to show intent during the Government's case-in-chief, however, even if the defendant plans to present a general denial defense. *United States v. Miller*, 974 F.2d 953, 960 (8th Cir. 1992) (citing Eighth Circuit cases). *Cf. United States v. Jenkins*, 7 F.3d 803, 806-07 (8th Cir. 1993) (Rule 404(b) evidence is inadmissible to show intent during rebuttal when the defendant denied committing the criminal act).

We conclude the district court properly admitted the Rule 404(b) evidence. The evidence of Crouch's earlier illegal gun sales showed Crouch had opportunity because he possessed a large number of uninventoried guns that could be sold to a felon like McGuire without being traced or detected. The evidence also showed Crouch's common scheme to sell firearms to prohibited persons. The district court did not abuse its discretion in admitting the evidence for these purposes and, contrary to Crouch's assertion, in concluding the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. The record also shows the Government properly notified Crouch of its intent to offer the evidence under Rule 404(b) and Crouch was not prejudiced by the district court's denial of Crouch's motion for a continuance to study the evidence. Thus, the district court did not abuse its discretion in denying the motion for a continuance. *See United States v. Trupiano*, 11 F.3d 769, 774 (8th Cir. 1993) (standard of review).

Based on the court's decision to allow evidence of Crouch's earlier weapon sales, Mandacina argues the district court should have granted his motion to sever. We reverse a denial of a motion to sever only when the defendant shows an abuse of discretion that resulted in severe prejudice. *United States v. McGuire*, No. 94- 1150, 1995 WL 10789, at *8 (8th Cir. Jan. 13, 1995). Mandacina has not shown he was severely prejudiced by introduction of the evidence against Crouch. Crouch's earlier weapon sales did not involve Mandacina and

the' district court minimized any prejudice to Mandacina by instructing the jury that the evidence of Crouch's sales should not be considered when deciding the case against Mandacina. *See id.* at *9. We thus conclude the district court properly denied Mandacina's motion to sever.

Mandacina next attacks the jury instructions. Mandacina asserts the district court should have given his proposed instruction on aiding and abetting an armed robbery, which would have required the jury to find that a weapon Mandacina sold was taken into the banks and used during the robberies. Mandacina also asserts the jury instruction on aiding and abetting the use of a firearm during the robberies should have required the jury to find that a firearm Mandacina supplied was carried into the bank during the robbery. Because the proposed instructions do not correctly state the law, Mandacina was not entitled to have the instructions given to the jury. *United States v. Akers*, 987 F.2d 507, 513 (8th Cir. 1993).

Mandacina also contends the instruction on the Oklahoma bank robbery was incorrect because it lacked aiding and abetting language. The Government counters that the aiding and abetting ' language in instruction 39 applied to both the Oklahoma and Nebraska robberies. Although instruction 39 specifically refers only to the Nebraska robbery, instruction 16 informed the jury that the indictment charged Mandacina with aiding and abetting the Oklahoma robbery. Taken as a whole, the instructions adequately informed the jury that Mandacina was charged with aiding and abetting the Oklahoma robbery, and of the elements necessary to find Mandacina guilt.y of aiding and abetting that robbery.

Last, Mandacina contends the district court should have adjusted his sentence downward for minor or minimal participation in the bank robberies. See U.S.S.G. § 3B1.2 (1994). Even though Mandacina did not actively participate in the

robberies, he repeatedly supplied guns to the bank robbers, completely financed and armed one of the robberies, and later shared in that robbery's proceeds. Thus, the district court did not commit clear error in denying the adjustment. *See United States v. McCoy*, 36 F.3d 740, 743 (8th Cir. 1994) (standard of review).

Having considered and rejected all of Crouch's and Mandacina's arguments, we affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER AREA CODE 202

CLERK OF THE COURT 479-3011

May 31, 1995

Mr. James R. Wyrsch
1101 Walnut
Suite 1300
Kansas City, MO 64106-2122

Re: Charles J. Mandacina
v. United States
Application No. A-913

Dear Mr. Wyrsch:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on May 31, 1995, extended the time to and including August 25, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/

Loretta S. Ruffin
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER AREA CODE 202

CLERK OF THE COURT 479-3011

NOTIFICATION LIST

Mr. James R. Wyrsch
1101 Walnut
Suite 1300
Kansas City, MO 64106-2122

Mr. Drew S. Days III
Solicitor General
U.S. Department of Justice
Washington, DC 20530

Michael E. Gans
United States Court of Appeals for
the Eighth Circuit
511 U.S. Court & Customs House
1114 Market Street
St. Louis, MO 63101

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2383WMKC

United States of America,

Appellee,

vs.

Charles J. Mandacina, also known as Buddy Mandacina,

Appellant.

* Appeal from the
* United States
* District Court for
* the Western District
* of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 6, 1995

A true copy.

ATTEST: Michael E. Gans

/s/

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2383WMKC

United States of America,

Appellee,

vs.

Charles J. Mandacina, also known as Buddy Mandacina,

Appellant.

* Order Denying
* Petition for
* Rehearing and
* Suggestion
* for Rehearing
* En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 29, 1995

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

INSTRUCTION NO.___

If you find the government has failed to prove the existence of only one conspiracy, you must find the Defendant not guilty.

AUTHORITIES

United States v. Bynum, 485 F.2d 490, 497 (2d Cir. 1973)

INSTRUCTION NO.___

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who are the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment then you must acquit the Defendant. In other words, to find the Defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

AUTHORITIES

United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1985); *See also* Devitt and Blackmar, 2716 (1980 Pocket Supp.)

INSTRUCTION NO. 23

The crime of conspiracy as charged against all the defendants in Count One of the indictment, as four essential elements, which are:

One, on or about January 1987, two or more persons reached an agreement or came to an understanding to commit armed robberies, money laundering and to violate federal firearms law;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and

Four, while the agreement or understanding was in effect, a person or persons who had joined in the agreement knowingly did one or more of the following acts for the purpose of carrying out or carrying forward the agreement or understanding:

1. In the Spring of 1987, defendant PATRICK H. MCGUIRE and Thomas Earlywine travelled to Kansas City, Missouri, from their hometown of Rockford, Illinois, and purchased guns from defendant CHARLES J. MANDACINA, a/k/a BUDDY MANDACINA;

2. In the Fall of 1988, defendant PATRICK H. MCGUIRE and Thomas Earlywine again travelled to Kansas City, Missouri, for the purpose of purchasing firearms. During this visit, defendant PATRICK H. MCGUIRE, a convicted felon, purchased several weapons from defendant

SALVATORE MANDACINA a/k/a SAMMY JOE MANDACINA. This firearm transaction was arranged by defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA;

3. On May 10, 1989, defendant PATRICK H. MCGUIRE and Thomas Earlywine robbed the Gem City Savings and Loan, Decatur, Illinois, using the firearms which had been purchased from defendants SALVATORE MANDACINA a/k/a SAMMY JOE MANDACINA, and CHARLES J. MANDACINA. Defendant PATRICK H. MCGUIRE and Thomas J. Earlywine took $34,693 in the robbery;

4. On July 10, 1989, defendant PATRICK H. MCGUIRE and Thomas Earlywine robbed the Heartland Federal Savings and Loan, Urbana, Illinois, again using the firearms purchased from defendants SALVATORE MANDACINA a/k/a SAMMY JOE MANDACINA, and CHARLES J. MANDACINA. Defendant PATRICK H. MCGUIRE and Thomas J. Earlywine took $22,203.45 in this robbery;

5. On August 18, 1989, defendant PATRICK H. MCGUIRE and Thomas Earlywine robbed the Wauwatosa Savings and Loan, in Waukesha, Wisconsin, again using the firearms that had been purchased from defendants SALVATORE MANDACINA a/k/a SAMMY JOE MANDACINA, and CHARLES J. MANDACINA a/k/a BUDDY MANDACINA. Defendant PATRICK H. MCGUIRE and Earlywine obtained $97,395 in this robbery;

6. On November 8, 1989, defendant PATRICK H. MCGUIRE, Thomas Earlywine, and Dodds robbed the Capitol Federal Savings and Loan Association in Wichita, Kansas. Defendant PATRICK H. MCGUIRE and Thomas Earlywine used the firearms purchased from defendants SALVATORE MANDACINA a/k/a SAMMY JOE MANDACINA, and CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, in the robbery which netted $68,256;

7. On or about January 13, 1990, defendant PATRICK H. MCGUIRE and Thomas Earlywine purchase a large number of firearms from defendant DENNIS M. CROUCH in Kansas City, Missouri. This firearms transaction was arranged by defendant JOHN A. MANDACINA with the firearms being delivered to defendant PATRICK H. MCGUIRE by defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA;

8. On January 17, 1990, defendant PATRICK H. MCGUIRE, Thomas Earlywine and Terrence Dodds robbed the Occidental Nebraska Federal Savings Bank in Omaha, Nebraska. Defendant PATRICK H. MCGUIRE, Thomas J. Earlywine and Terrence Dodds used the firearms that had been purchased from defendants DENNIS M. CROUCH, JOHN A. MANDACINA, and CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, in the robbery. The McGuire bank robbery crew returned to Kansas City, Missouri, after the robbery which netted $17,025;

9. On April 5, 1990, defendant PATRICK H. MCGUIRE and Thomas Earlywine robbed Ameritrust Bank

in Columbus, Ohio, again using the guns which had been purchased from defendants DENNIS M. CROUCH, JOHN A. MANDACINA, and CHARLES J. MANDACINA a/k/a BUDDY MANDACINA. Of the $64,290 taken in this robbery, $10,000 was in 10-dollar bills with consecutive serial numbers;

10. On or about and between July 9, 1990, and July 23, 1990, defendant PATRICK H. MCGUIRE exchanged the $10,000 in consecutive serial number 10-dollar bills taken in the Columbus bank robbery with defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, for the purpose of concealing or disguising the proceeds of the Columbus, Ohio bank robbery;

11. On or about September 4, 1990, defendant PATRICK H. MCGUIRE and Thomas Earlywine were involved in an incident in Nashville, Tennessee, in which they lost some of their guns and their police scanners. Thereafter, defendant PATRICK H. MCGUIRE and Thomas Earlywine travelled to Kansas City, Missouri, in order to obtain more firearms;

12. On or about September 5, 1990, defendant PATRICK H. MCGUIRE and Thomas Earlywine obtained more firearms from defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, at the Red Front Restaurant and Lounge in Kansas City, Missouri. Defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, also provided defendant PATRICK H. MCGUIRE and Thomas Earlywine with money in order to finance their trip to Oklahoma City, Oklahoma, to rob a bank;

13. On September 11, 1990, defendant PATRICK H. MCGUIRE and Thomas Earlywine robbed the Local Federal Savings and Loan, Warr Acres Branch, Warr Acres, Oklahoma. Defendant PATRICK H. MCGUIRE and Thomas Earlywine, using the guns provided by defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, took $27,303 from the federally insured bank. Immediately thereafter, defendant PATRICK H. MCGUIRE and Thomas Earlywine travelled back to Kansas City, Missouri, where they returned the firearms to defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA. Defendant PATRICK H. MCGUIRE also repaid defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, for the money that defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, had loaned them, and gave a portion of the proceeds of the bank robbery to defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA. Thereafter, defendant PATRICK H. MCGUIRE stayed for several weeks in Kansas City, Missouri, in order to determine whether an arrest warrant had been issued for him because of the incident in Nashville, Tennessee;

14. On December 13, 1990, defendant PATRICK H. MCGUIRE and Terrence Dodds were arrested following an armed bank robbery in Milwaukee, Wisconsin. Thereafter defendant PATRICK H. MCGUIRE contacted Thomas Earlywine in an attempt to raise bail or escape from jail. Thomas Earlywine contacted defendant CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, on several occasions in the following months to inform CHARLES J. MANDACINA a/k/a BUDDY MANDACINA, of defendant PATRICK H. MCGUIRE's arrest and attempt to make bail;

15. On March 16, 1992, Thomas J. Earlywine was arrested in Rockford, Illinois, for the bank robberies he had committed with defendant PATRICK H. MCGUIRE.

For you to find a defendant guilty of this crime the government must prove all of these essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that defendant not guilty.

INSTRUCTION NO. 28

If you have found beyond a reasonable doubt that a conspiracy existed and that a defendant was one of its members, then you may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant had joined the conspiracy, for a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

INSTRUCTION NO. 39

A person may also be found guilty of bank robbery even if he personally did not do every act constituting the offense charge, if he aided and abetted the commission of a bank robbery.

In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

(1) have known that a bank robbery was being committed or going to be committed; and

(2) have knowingly acted in some way for the purpose of aiding the omission of the bank robbery.

You should understand that merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has n knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

For you to find the defendant guilty of bank robbery by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the essential elements of bank robbery were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

In the alternative, under the conditions defined in this instruction, a defendant who has also been found guilty of conspiracy may also be found guilty of the bank robbery charged in Count Six even though he did not participate in the acts constituting that offense. The reason for this is that a co-conspirator committing an offense in furtherance of a conspiracy may be held to be an agent of other conspirators.

Therefore, if you find that Charles J. Mandacina and Dennis Crouch are guilty of the conspiracy charged in Count One, you may find either or both of them guilty of the bank robbery in Count Six provided that you find that each of the following essential elements have been established beyond a

reasonable doubt.

One, that on or about January 17, 1990, there was a conspiracy to rob banks.

Two, that during and in furtherance of that conspiracy Thomas J. Earlywine and Terrence Dodds robbed the Occidental Nebraska Federal Savings Bank in Omaha, Nebraska;

Three, that defendants Charles Joseph Mandacina and Dennis Crouch were members of the conspiracy at the time of the events described in paragraph one and two; and

Four, that defendants Charles Joseph Mandacina and Dennis Crouch could reasonably have foreseen that a bank was going to be robbed as a necessary or natural consequence of the conspiracy.

For you to find a defendant guilty of bank robbery by reason of being a member of a conspiracy to rob banks, the government must prove each of these essential elements beyond a reasonable doubt; otherwise, you must find that particular defendant not guilty of the crime charged in Count Six.

INSTRUCTION NO. 40

A person may also be found guilty of using a firearm during a crime of violence even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of using a firearm during a crime of violence.

In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed,:

(1) have known that using a firearm during a crime of violence was being committed or going to be committed; and

(2) have knowingly acted in some way for the purpose of aiding the commission of using a firearm during a crime of violence.

You should understand that merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

For you to find the defendant guilty of using a firearm during a crime of violence by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the essential elements of using a firearm during a crime of violence were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

In the alternative, under the conditions defined in this instruction, a defendant who has been found guilty of conspiracy may also be found guilty of using a firearm during a crime of violence even though he did not participate in the acts constituting that offense. The reason for this is that a conspirator committing an offense in furtherance of the conspiracy may be held to be an agent of other conspirators.

Therefore, if you find that Charles J. Mandacina is guilty of the conspiracy charged in Count One, you may find him guilty of the offense charged in Counts Seven and Twelve, provided that you also find that each of the following essential elements have been established beyond a reasonable doubt:

First, that on or about January 17, 1990 and September 7, 1990 there was a conspiracy to rob banks;

Second, that during and in furtherance of that conspiracy, a member of that conspiracy knowingly used a firearm to commit bank robberies on January 17, 1990 and September 7, 1990;

Third, that defendant Charles J. Mandacina was a member of the conspiracy described in Paragraphs First and Second; and

Fourth, that defendant Charles J. Mandacina could reasonably have foreseen that a firearm was going to be used to commit bank robberies as a necessary or natural consequence of the conspiracy.

If you find that Dennis Crouch is guilty of the conspiracy charged in Count One, you may find him guilty of the offense charged in Count Seven, provided that you also find that each of the following essential elements have been established beyond a reasonable doubt:

First, that on or about January 17, 1990, there was a conspiracy to rob banks;

Second, that during and in furtherance of that conspiracy, a member of that conspiracy knowingly used a firearm to commit a bank robbery on January 17, 1990;

Third, that defendant Dennis Crouch was a member of the conspiracy described in Paragraphs First and Second; and

Fourth, that defendant Dennis Crouch could reasonably have foreseen that a firearm was going to be used to commit a bank robbery as a necessary or natural consequence of the conspiracy.

For you to find a defendant guilty of using a firearm during a crime of violence as described above, the government must prove each of the essential elements beyond a reasonable doubt as to that defendant, otherwise you must find that defendant not guilty of a crime charged in Counts Seven and Twelve.

Q. Mr. Dodds, let's first talk about the nature and extent of how you, McGuire, and Earlywine did business back in '89 and '90, when you would come from Rockford to our city to plan crimes; all right?

A. Yes, sir.

Q. Let's talk about the conspiracies and how they worked. Would be it fair to say there was no long drawn-out plan, well-thought out plan in Rockford, Illinois, that all right fellows, on this day we are going to hit Wichita, on this day we are going to hit Waukesha, on this day we are going to hit Milwaukee, on this date we are going to hit Omaha. That's not how that worked, correct?

A. That's correct, sir.

Q. You guys would go wherever you planned these robberies and drink, and say, well, let's plan Omaha tomorrow. You would do whatever you had to do to get to Omaha, when you got home, split the loot up.

That was the end of it, correct?

A. Yes. For the most part; that's correct.

Q. That was the end of that conspiracy, correct?

Then when you ran out of money, you would come up with another conspiracy to rob another bank?

A. Yes, sir.

Q. That's how it worked?

A. That's the way Mr. McGuire ran things. Yes, sir.

Q. We are talking about separate and distinct conspiracies, when you robbed Omaha, Wichita, Waukesha, et cetera, correct?

A. We did what I was told by Mr. McGuire, sir. Yes, that's correct, if that's the way that you want to put it.

Q. When you get home and split up the loot, the conspiracy to rob that particular bank is over with, correct?

A. Yes, correct.

Q. Thank you.

And as you would rob one bank, there was no plan to commit a particular robbery in another city at another time?

A. Not a particular plan. No, sir.

Q. And was it contemplated as you robbed each bank, that this would be your last bank, hopefully you would go home and get legitimate jobs, and not have to go and resort to robbing banks again?

A. I know I felt that way. I don't know if Mr. McGuire did though.

Q. How about Earlywine?

A. I can't speak for him, sir. I don't know.

Q. So basically we have a number of separate and distinct conspiracies taking place in different cities throughout the Midwest in the United States, correct?

A. Yes, sir.

1794

TUESDAY, NOVEMBER 2, 1993
MORNING SESSION

(The following proceedings were held in the courtroomoutside of the presence and hearing of the jury.)

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THE COURT: All right. At this time, gentlemen, the record should indicate that we have been in instruction conference since 8 o'clock this morning, and I am having my clerks do the remaining numbering on the instructions I am going to be giving, so that we can begin to make a record at this time.

I want to advise the attorneys for the defense that I am refusing Charles Mandacina's instructions numbered CM-1 through CM-63.

I am refusing Salvadore Mandacina's instructions offered 1 through 9, and I am refusing Dennis Crouch's instructions C-1 through C-42 that have been offered.

This is a general refusal. Some of these refusals, of course, include duplications of standard Eighth Circuit instructions that could have just as easily been used with Charles Mandacina's or Mr. Crouch's, and I was working with the Government's first, they used those first. And that's why I stuck to them.

But you may now make your records, gentlemen, on any or all of your instructions that I have indicated that I

1796

have refused. Mr. Bunch?

MR. WYRSCH: Your Honor —

THE COURT: Mr. Wyrsch, excuse me.

MR. WYRSCH: Your Honor, with respect to Charles Mandacina CM-1 through 63, and could we also object at the time we get a copy of the Court's instructions, or do we need to do that, if that would be possible.

THE COURT: Yes, sir. I just wanted to take care of a few.

MR. WYRSCH:

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In addition, we believe that there is evidence of more than one conspiracy, that the one conspiracy alleged in

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Count I is simply not there. We have submitted CM-32 and CM-34 in that regard. They are alternate instructions. Either one would be satisfactory with us.

And we would just simply, I know that the Court is not going to give those, but I simply wanted to make a record on that.

Q. Did you have a plan -- before the first bank robbery, did you have a long, drawn-out plan that you were going to rob all of these different banks in all of these different cities or was this a one at a time type of thing?

A. It was a singular thing.

Q. A singular thing, in your words, correct?

A. That's what I said.

Q. You didn't even start talking about another city or another bank robbery until you ran out of money; is that correct?

A. No, it's not until we ran out of money.

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